Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Sandwich Isles Communications, Inc.	FCC Order 16-167 in WC Docket 10-90

To: The Commission

PETITION FOR REVIEW OF JANUARY 16 USAC DEMAND LETTER

I. Introduction

This Petition, submitted pursuant to Section 54.722 of the Commission's Rules, is in fact the outgrowth of the continuation of the arbitrary and unsupported efforts of the Universal Service Administrative Company ("USAC") to "find" that Sandwich Isles Communications, Inc. ("SIC") has extracted funds from the Universal Service Fund to which it is not entitled. The Commission's uncritical acceptance of the USAC findings and its refusal to even recognize, much less apply, the correct legal standards only serves to compel the conclusion that the Commission's only objective is to put SIC out of business regardless of the harm that action might cause to the native Hawaiian residents of the Hawaiian Home Lands.

SIC has addressed these issues—including the matters purportedly addressed in the January 16 and March 2, 2018 letters (submitted as Exhibit A) from USAC, which are the subject of this Petition—at length in SIC's Petition for Reconsideration and in its Response to the Commission's Forfeiture Order; this Petition should therefore be considered a supplement to the earlier filed pleadings which have been before the Commission for fifteen months. *See* Petition for Reconsideration of FCC Order 16-167, In re Sandwich Isles Communications, Inc., WC Dkt. No. 10-90 (filed Jan. 4, 2017); *see also* SIC's Comments and Response to Notice of Apparent Liability and Forfeiture Order (FCC Order 16-165) and FCC Order 16-167, In re Sandwich Isles Communications, Inc., File No. EB-IHD-15-00019603 (filed Feb. 3, 2017).

SIC need not detail the facts which are fully set forth in the Petitions, but it is necessary to put the letters that are the subject of this pleading in context. In the middle of 2015, the Commission ("FCC") abruptly instructed USAC to "suspend" High Cost Universal Service support to SIC during the pendency of an audit it was instructed to carry out. USAC then embarked on the most thorough, painstaking audit all the way down to SIC's cost for manhole covers, requesting and receiving literally millions upon millions of pages of SIC's records and hours upon hours of telephone conversations with SIC's accounting staff. USAC itself recognized that the manner in which the audit was carried out and its supposed findings could not be sustained and responding to SIC's comments on the initial report it reduced its claim of excessive payment by about 50%. USAC simply ignored SICs comments and detailed documentation in the issuance of its final report.

In December of 2016, the FCC issued an order addressing the USAC final report. FCC Order, WC Docket No. 10-90, 31 FCC Rcd 12999 (Dec. 5, 2016) (the "Order"). The Order blindly accepts all the USAC findings and misreads and misconstrues the governing legal standards in order to sustain the results that USAC purported to reach. The Order is thus itself legally and factually indefensible for the reasons spelled out in the Petition for Reconsideration that was filed in February 2016. That Petition and the related Comments and Response to the Commission's Notice of Apparent Liability and Forfeiture Order have been pending ever since, having the effect of precluding timely judicial review of a patently defective set of orders.

One of the provisions of the Order recognized a baseless "cap"[1] on management fees. The Order directed USAC to calculate the amount of allegedly overpaid management fees. USAC elected to examine the management fees paid by SIC for a thirteen-year period. The thirteen-year period was adopted by USAC based on an insupportable reading of the Order as the Order itself only directed SIC to submit revised cost of service studies for

[1] No basis has been disclosed for this alleged cap.

the years 2013-2015,[2] and USAC is entirely silent on how it computed the cap for the 10 years prior to 2013 that it purportedly examined. Moreover, USAC as well as the Commission were on notice through the Petitions filed in February that a demand for recovery for prior years was barred under the applicable statute of limitations as well the fact that there were at least grave questions as to the legal basis for the cap and how it was computed. *See* Petition for Reconsideration at 9-11. Predictably, USAC ignored the Petition completely.

On January 16, 2018, USAC sent a demand for $6,770,938 for allegedly overpaid management fees for the thirteen-year period. The letter was notable for the fact that it provided no substantiation for this conclusion whatsoever. It merely demanded payment of the huge sum without as much as a single supporting calculation. SIC promptly informed USAC that it could not respond to this demand until it was provided with the supporting documentation that purportedly formed the basis for this demand and for an explanation of how the cap was arrive at and computed. *See* Jan. 18, 2018 Letter to USAC, attached as Exhibit B.

USAC failed to respond to that request until March 2, 2018, which suggests that either the calculations had not been performed when the original

[2] Order at ¶ 148.

letter was issued or that USAC was determined to curtail further, justifiable criticism of the manner in which it carried out this audit or of its conclusions. Ignoring the FCC Rules, USAC asserted that the deadline for filing an appeal is March 19, 2018, despite the plain language of the rule which allows 60 days for a party to seek review of a USAC demand. Regardless, the March 2 submission provided SIC with no basis for examining the factual predicates for the demand. In fact, the provided spreadsheet is simply conclusory and the fact that it was—in part—derived from SIC's ledger hardly makes the manner in which the computations were performed self-explanatory; nor does this at all explain the derivation of the cap without which the computations of management fees paid is meaningless.

SIC submits that these facts[3] evidence at best a complete disregard for the financial stability of SIC and the service it provides to native Hawaiians and a determination to reach a result without regard to the most basic considerations of due process, or the interests and needs of the subscribers in the Hawaiian Home Lands.

[3] The facts include USAC providing no calculation to support its demand; asserting that the deadline to appeal runs from the date they made a bare demand with no support; and ignoring the clearly applicable statute of limitations plain language of the 1996 Telecommunications Act's mandate to provide "sufficient" and "predictable" support for rural telecommunications.

II. <u>The USAC Demand Is Invalid Because It Ignores The Governing Statute of Limitations</u>

The demand is flawed and should be rejected by the FCC because the law prohibits the FCC from demanding repayment of amounts paid more than four years ago. 28 U.S.C. § 1658(a).

As SIC detailed in the Petition for Reconsideration, the Order's assertion that the FCC can claim an "administrative remedy" that ignores the statute of limitations is plainly unlawful. Petition for Reconsideration at 16-18. Indeed, in *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1 (D.C. Cir. 2016), *vacated pending en banc rehearing*, the Consumer Financial Protection Bureau ("CFPB") lost the very argument attempted by the FCC here: that there was no statute of limitations for enforcement actions brought by it "in an administrative proceeding, as opposed to in court." *Id.* at 50. The D.C. Circuit flatly rejected this argument. *See id.* at 54 ("'Congress does not, one might say, hide elephants in mouseholes.'" . . . [W]e would expect Congress to actually say that there is no statute of limitations for CFPB administrative actions to enforce Section 8, especially given that the CFPB has full discretion to pursue administrative actions instead of court proceedings and can obtain all of the same remedies through administrative actions that it can obtain in court. But the text of [act] says no such thing.").

There is thus a four-year statute of limitations on the recovery of alleged "overpayments." 28 U.S.C. § 1658(a). To the extent that USAC, at the FCC's direction, seeks redress for alleged overpayments of USF funds, Congress's four-year statute of limitations applies. USAC (and the FCC's) attempt to ignore the statute of limitations in order to achieve an inflated "overpayment" is not reasoned decision-making, but rather targeted action that is arbitrary, capricious and contrary to law.

III. **<u>The USAC Demand Is Invalid Because It Is Not Supported By Any Objective Standard Or Evidentiary Basis</u>**

As SIC made clear in the Petition for Reconsideration, USAC's claim that SIC's Management Fees were "excessive" ignores the fact that there were no objective standards in place to which SIC could have referred in making what appeared to it at the time to be reasonable and normal business decisions made in the ordinary course. *See generally* Petition for Reconsideration. First, USAC ignores the fact that there was in place a cap on corporate operating expenses. Because the cap on operating expenses was applied to SIC for a portion of the period, the portion of the management fees related to bonuses which are the basis of USAC's claim were not even subject to USF reimbursement. *See, e.g.*, SIC Response to USAC's Final Audit Report at 13-14.

Moreover, USAC seeks to cure the arbitrary and subjective character of this demand by reference to an alleged study of a very small number of eligible telecommunications carriers who may or may not[4] be comparable in size and operation to SIC. *See* FCC 16-167 Order at 32 ¶ 103; Notice of Apparent Liability at 16-17 ¶ 43. On the basis of this "study"—the details of which are not disclosed—the Order asserts that the Management Fees paid by SIC exceeded the "average" of the study group and were, therefore, excessive. *See* FCC 16-167 Order at 32 ¶ 103; *see also* Notice of Apparent Liability at 16-17 ¶ 43. This simply parrots the USAC findings which equally do not disclose any information about the "study." The explanation of how the average was computed does not even afford a basis for determining whether the bundle of costs upon which the comparison was made correlates with the bundle of costs that are subsumed within SIC's use of the term "Management Fees." For example, in SIC's case, the Management Fees include rent paid to its parent company for shared space, and USAC's objection was not that the expense had been misallocated but, rather, that SIC's decision to relocate its offices costed more than it would have to remain in facilities shared with its parent company. *See* USAC Final Audit Report at 59; FCC 16-167 Order at 37-38

[4] It is doubtful that the firms (which have not been disclosed to SIC) in this study have costs as high as Hawaii's; or have to deal with the cost of serving a study area comprised of hundreds of noncontiguous parcels of land separated, in many cases, by ocean.

¶¶ 121-123. In the end, SIC elected not to contest this finding because the net effect was less than $25,000 in "overpayments." That hardly establishes that the study was validly carried out or rationally applied to SIC.

In sum, the entirety of the management fee analysis set forth in the January letters ignores considerations of consumer convenience and efficiency in the delivery of service to subscribers, and establishes a newly-minted "policy," under which reasoned and reasonable expenses are to be determined by USAC auditors solely on the basis of highly subjective and speculative cost considerations that are untethered to any objective criteria. USAC's demand regarding management fees and the Order upon which it is based simply cannot be reconciled with any generally-accepted principles of reasoned decision-making.

IV. USAC's Demand Is Part of A Larger Attempt to Ignore The Law, Eliminate SIC, and Eliminate Service To Native Hawaiians

Congress has clearly provided for, and required that, rural utilities such as SIC receive specific, sufficient and predictable support from the FCC and USAC. 47 U.S.C. § 254(b)(5). SIC followed the rules, obtained the approvals and for years received the support it is entitled to receive under the law.

SIC's infrastructure plans were presented to, and approved in advance by, the FCC and the Rural Utilities Service ("RUS"). The agencies knew SIC would incur significant costs to construct the proposed infrastructure. Those same agencies recognized that the Universal Service Fund ("USF") was designed to defray these precise costs to enable SIC and other carriers serving rural, insular areas, to provide high-quality telecommunications services at reasonable rates consistent with Congress's mandate in the Telecommunications Act of 1996. The FCC continued to approve the funding of SIC's infrastructure for years before abruptly and arbitrarily revoking such approval.

Under the Telecommunications Act of 1996 and the FCC's implementing regulations, an eligible telecommunications carrier has a statutory right to receive USF support:

> A competitive eligible telecommunications carrier ***shall receive*** universal service support to the extent that the competitive eligible telecommunications carrier captures the subscriber lines of an incumbent local exchange carrier (LEC) or serves new subscriber lines in the incumbent LEC's service area.

47 C.F.R. § 54.307(a) (emphasis added).

Once an eligible telecommunications carrier ("ETC") submits a report to USAC regarding "the number of working loops it serves in a service area pursuant to" a specified schedule, 47 C.F.R. § 54.307(b), USAC is then obligated to disburse the requisite amount of funds to the ETC each month.

See 47 C.F.R. § 54.702(b) ("The Administrator shall be responsible for . . . disbursing universal service support funds."); § 54.307(a), (e) (disbursements shall be made monthly).

USAC's demand and the FCC's Order ignore these legal requirements, and instead seek to eliminate funding to SIC despite the requirements Congress included in the Telecommunications Act and the requirements in the FCC's own regulations. The only pretext offered for this outcome is the FCC's duty to prevent "fraud, waste and abuse" in the administration of the USF. Nowhere in the letters that are the subject of this Petition or in the Orders from which the USAC letters derive is there any finding that SIC and its consultants have engaged in fraud, waste or even knowingly misused or misreported USF funds. The law must prevail and the rights of native Hawaiians to telecommunications service like all other native peoples in the United States must be protected. For the reasons set forth herein, FCC should reverse USAC's incorrect and baseless demand and the Order which underlies it.

Dated: March 19, 2018

Respectfully submitted,

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